JAN 27 1932
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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1931

EDGAR PERCY LEWIS AND RICHARD F. COOPER As Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REHEARING

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Petitioners respectfully ask for a rehearing.

In the opinion it is said:

> "Counsel for petitioners * * * maintains that the Commissioner lacked authority to redetermine and reassess the tax after the statute had run."

This is a correct statement of the contention.

It is further said in the opinion that counsel also maintains:

> "that at the time of his (the Commissioner's) last decision he was restricted to consideration of the demand for refund and determination of whether the trustees were entitled to deduct the state inheritance taxes."

While the respondent's brief seems to attribute this position to the petitioners, no such contention has been made by them. Throughout the case in all courts it has been disclaimed—specifically in the paragraph at the top of page 6 of petitioners' brief in this court; and twice in response to questions on the oral argument.

The question of the burden of proof on which the case turned in the lower courts depends wholly upon the legal effect given to the Commissioner's letter refusing payment. If that supersedes the assessment and conditions the tax, the decision is right. If, on the other hand, the assessment conditions the tax, it seems to us that the finding therein that the attorney's fees were a business expense, and therefore deductible, made a *prima facie* case for recovery and put the burden on the defendant to show a tax liability notwithstanding the finding and assessment.

When the government insists upon a tax "which might have been properly assessed and demanded," as the opinion properly describes it, we think the burden is on the government to prove the liability by some other evidence than the letter refusing a refund.

A tax may be collected by assessment. In such case the assessment is *prima facie* proof of the legality of of the tax assessed. A tax may be collected by suit without assessment. But in such case the burden of proof is on the government.

Little Miami, etc., R. Co., v. U. S., 108 U. S. 277

Respectfully submitted,

N. E. CORTHELL, *Attorney and of Counsel for Petitioners*

I certify that the foregoing petition is presented in good faith and not for delay.

N. E. CORTHELL, *Attorney and of Counsel for Petitioners*

Laramie, Wyoming
January 23, 1932